

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
Petitioner,)
v.) No. 21-404
WASHINGTON, ET AL.,)
Respondents.)
- - - - -

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 21-404,
5 United States versus Washington.

6 Mr. Stewart.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE PETITIONER

9 MR. STEWART: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 First, this case is not moot. We
12 acknowledge that Washington's recent enactment
13 of SB 5890 makes it uncertain whether a decision
14 invalidating HB 1723 will ultimately produce any
15 financial benefit to the United States.

16 Under this Court's precedents,
17 however, the case is not moot so long as there
18 is a reasonable possibility that such a benefit
19 will ensue. Respondents have not carried their
20 heavy burden of negating that possibility.

21 Second, HB 1723 discriminates against
22 the federal government and those with whom it
23 deals. On its face, it is limited to a specific
24 federal facility, and even within that facility,
25 it applies only to workers engaged in the

1 performance of federal contractors -- contracts,
2 not to state or purely private workers.

3 Third, HB 3170 -- I'm sorry, 40 U.S.C.
4 3172(a) does not authorize that discriminatory
5 treatment. Properly understood, Section 3172(a)
6 authorizes Washington to apply evenhandedly to
7 federal facilities the same workers'
8 compensation laws that apply in other workplaces
9 in the state. It does not authorize Washington
10 to subject federal contractors at the Hanford
11 facility to uniquely onerous burdens.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Stewart, could
14 you give us a -- a more fulsome explanation of
15 the financial interests of the United States in
16 the case considering -- in the context of the
17 mootness argument?

18 MR. STEWART: Well, before SB 5890 was
19 passed, there was no question that the United
20 States had a financial interest in the case.
21 That is, even though the financial burdens would
22 fall in the first instance on the federal
23 contractors, the United States has entered into
24 various arrangements whereby it would absorb
25 those costs. And, most significantly, it's

1 entered into a memorandum of understanding with
2 the state agency whereby it would act as a
3 self-insurer and would pay any increased
4 workers' compensation costs attributable to most
5 of the federal contracts on the site.

6 And so the question for purposes of
7 mootness is whether the enactment of SB 5890 has
8 effectively divested the United States of that
9 financial interest. And the Respondents have
10 identified two possible reasons that that might
11 be so.

12 First, they've said, SB 5890 covers
13 all of the workers who were previously covered
14 by HB 1723 and some more as well, and,
15 therefore, it says, even if we were able to get
16 the worker's claim under SB 1723 declared
17 invalid or set aside, it wouldn't produce any
18 financial benefit for the United States because
19 the worker could all -- always re-file under SB
20 5890 and could obtain the same benefits on the
21 same terms.

22 We think it's not a natural
23 construction of the new statutory language to
24 say that the coverage would be coextensive in
25 that way. HB 1723 applied to all DOE Hanford

1 facility workers at specified but broadly
2 defined locations within the Hanford site,
3 without regard to the proximity of their work to
4 the actual storage or treatment of hazardous
5 waste.

6 And, by contrast, the crucial language
7 in SB 5890 is "structures and their lands" where
8 specified categories of waste are stored and
9 disposed of. And the phrase "structures and
10 their lands" is not self-defining, but you would
11 imagine that the lands are areas outside the
12 structure that are in fairly close proximity to
13 the structure itself.

14 We've identified two types of
15 structures. One is a waste treatment facility
16 at the center of the site that is currently
17 under construction, meaning that waste will
18 ultimately be treated there, but that's not
19 happening yet. And that -- workers at that
20 facility would not naturally be said to be
21 working on structures and their lands where
22 wastes are being treated or disposed of.

23 The same thing applies to some of the
24 Hanford office workers, who worked in structures
25 where there are no -- were no hazardous waste.

1 So we think that there's at least an open
2 question whether some of the workers who were
3 covered by HB 1723 would be covered by SB 5890.

4 The second mootness argument that the
5 state has made in its letter of last Monday was
6 that under the effective date provision of SB
7 5890, work -- that law will apply to all future
8 stages in any pending controversy about a
9 particular claimant's entitlement to benefits
10 under the law.

11 And so, for example, if a claimant was
12 denied benefits by DOE and then has an appeal
13 pending to the state industrial board,
14 Washington's view of the law now is that if the
15 claimant is not covered by -- even if the claim
16 was submitted before SB 90 was enacted, if the
17 claimant was covered by HB 1723 but not under
18 the new law, the claimant will not be entitled
19 to benefits because the new law will govern not
20 only new claims but additional stages in the
21 processing of an existing claim.

22 And it's possible that the Washington
23 courts will sustain that reading, but any
24 claimant who was covered by the prior law and
25 not by the new one can be expected to resist it.

1 And so we think that there is at least a
2 reasonable possibility that the -- the courts
3 would ultimately hold any claimant in that
4 position would be entitled to benefits if HB
5 1723 remains operative.

6 And so, to summarize, it was clear
7 before the enactment of SB 5890 that the United
8 States would suffer harm, financial harm, from
9 this law, and the new developments that the
10 state have -- has pointed to don't eliminate
11 that possibility.

12 JUSTICE KAGAN: Do you think, if this
13 was the position you were in when you had to
14 make a decision to file for a petition for
15 certiorari, you would have filed?

16 MR. STEWART: If -- if they had
17 enacted the law between the time of the Ninth
18 Circuit's decision and the time when a petition
19 for certiorari had been due, we might not have
20 filed. We might have filed but asked simply
21 that the Court vacate the judgment below in
22 light of the -- the reduced practical effect of
23 the law even if we didn't think that the --

24 JUSTICE KAGAN: I guess that's what
25 I'm asking. Isn't your real interest here to

1 vacate the judgment below, you know, much more
2 than whatever residual possibility there are --
3 there is that these claims will affect the
4 government?

5 MR. STEWART: Well, we would certainly
6 like to have the judgment below vacated, and we
7 would also like for the Court to provide
8 affirmative clarification as to the scope of
9 3172(a). And, certainly, when -- when a case is
10 not technically moot, but the Court is deciding
11 is this a wise use of our resources to issue a
12 merits ruling, the Court would typically take
13 into account how likely is it that the legal
14 principles involved will bear on the resolution
15 of future cases. That's not a basis for finding
16 the case not to be moot, but if it isn't moot,
17 it's a basis for exercising the Court's
18 discretionary powers.

19 The second thing I would say is we
20 also have an interest and we think the Court has
21 an interest in avoiding the sorts of
22 post-certiorari maneuvers that it's referred to
23 in the past. That is, if a state, before a cert
24 petition was due, had amended the law in the way
25 that it has, it would have effectively been

1 giving up on the possibility of applying HB 1723
2 on into the future with its full coverage.

3 And the state was unwilling to make
4 that sacrifice at the time whether -- when it
5 was unclear whether this Court would grant
6 review. And so we think that there is an
7 interest in terms of the Court's sound
8 management of its docket, again, if the case is
9 not moot, in issuing a decision on the merits so
10 that that sort of maneuver will be discouraged.

11 CHIEF JUSTICE ROBERTS: Mr. Stewart, I
12 have to say I'm not quite sure I understand how
13 3172 works. The question is whether or not, if
14 the state owned the facilities, the workers'
15 compensation law would still work the same way,
16 right? That's where the antidiscrimination
17 principle comes in?

18 MR. STEWART: Yes.

19 CHIEF JUSTICE ROBERTS: Well, how does
20 that work? I mean, is there any doubt that if
21 the state owned these facilities that they would
22 apply the state workers' compensation rules to
23 those -- to the -- the workers?

24 MR. STEWART: Well, the -- the
25 language refers at the outset not to the state

1 legislature but to the state authority charged
2 with enforcing and requiring compliance with the
3 state workers' compensation laws, and, here,
4 that's Washington's Department of Labor and
5 Industries, which is referred to as L&I.

6 And then it says it can apply those
7 laws in the same way and to the same extent to
8 the federal -- to federal facilities as if the
9 premises were under the exclusive jurisdiction
10 of the state. And with respect to HB 1723, the
11 presumptions of workplace causation that it
12 adopts, these are not substantive rules that L&I
13 could apply to any other facilities anywhere
14 else within the State of Washington.

15 CHIEF JUSTICE ROBERTS: I'm sorry,
16 could you break that down? I -- I know that's
17 what it says, but I don't understand -- I don't
18 understand why, if there weren't a federal
19 facility here, but it was a state facility,
20 would those workers be covered by state workers'
21 compensation laws?

22 MR. STEWART: Yes, that's -- that's
23 correct, and the state could have adopted a law
24 that applied the HB 1723 presumptions throughout
25 the state. And if -- if a state had done that,

1 then 3172(a) would have authorized those
2 presumptions to be adopted at the federal
3 facility.

4 But the -- the impetus behind the
5 enactment of the statute was a decision of this
6 Court in Murray in 1934 which said because a
7 particular accident occurred on a federal
8 enclave and because the Federal Enclave Doctrine
9 said state laws enacted after the property was
10 ceded to the federal government can't be applied
11 to -- to the federal facility, the worker's
12 survivor was not able to obtain survivor's
13 benefits under the generally applicable state
14 law.

15 And so what Congress decided to do was
16 to pass a law that said whatever you are doing
17 in the rest of the state you can do on the
18 federal facility. And the way that the Court in
19 Goodyear Atomic described it was to say, on its
20 face, 3172(a) allows the worker -- it dictates
21 the same treatment of workers at the federal
22 facility that they would receive on --

23 JUSTICE KAGAN: I guess, I mean --

24 CHIEF JUSTICE ROBERTS: I'm -- I'm
25 sorry, I was just going to say I didn't quite --

1 I mean, you talked about what the impetus of it
2 is, but if you look at the language, it says, I
3 mean, if this were a state facility, would the
4 workers there be subject to the state workers'
5 compensation laws?

6 MR. STEWART: I think you can do --
7 yes. I think that you can do the comparison in
8 either of two ways. You could ask if Hanford --
9 well, if Hanford were operated by the state,
10 then the state could do it.

11 But, if the question is what would the
12 state authority be able to do on other land
13 within Washington that was subject to the
14 exclusive jurisdiction of the state, the answer
15 to that question would be no, nothing in HB 1723
16 authorizes L&I to apply these presumptions of
17 workplace causation to land anywhere else in
18 Washington.

19 And to the extent that the language is
20 ambiguous, then reading it to --

21 CHIEF JUSTICE ROBERTS: You'll give me
22 at least that?

23 MR. STEWART: I would -- yes, I'll
24 give you that it's ambiguous. I -- I wouldn't
25 acknowledge that there -- the other side's

1 reading is as strong as ours because I think, if
2 you look at Goodyear Atomic, if you look at what
3 precipitated this, if you look at kind of the
4 distinctly disfavored nature of laws that
5 discriminate against the federal government, it
6 would really be a stretch to read this language
7 to say that even though Washington is not doing
8 this anywhere else in the state, it can do it at
9 the Hanford facility because it would be able to
10 do this if no question of intergovernmental
11 immunity were posed.

12 JUSTICE KAGAN: But --

13 JUSTICE ALITO: I have the same
14 problem as the Chief Justice, and I still don't
15 understand the answer. I don't understand what
16 the counterfactual is. This is the closest I
17 could come, but this is probably off the mark,
18 and you'll tell me why.

19 Imagine it's a state facility. It's
20 owned by the state, but there are federal
21 contractors working there. Is that the
22 situation we have to imagine?

23 MR. STEWART: No. I think, when --
24 when they talk about land under the exclusive
25 jurisdiction of the state and the Court in

1 Goodyear Atomic said, on its face, the federal
2 law requires the application of the same laws
3 that would apply to purely private facilities
4 within the same state, in that case, Ohio.

5 And so I think the relevant comparator
6 is not what if we were looking at the same tract
7 of land, the Hanford facility, but asking what
8 could the state do if this were under its own
9 exclusive jurisdiction. It's what rules could
10 L&I apply to other tracts of land in Washington
11 that are, in fact, within the exclusive
12 jurisdiction of the state.

13 And that's -- it's consistent with the
14 -- it may not be the only reading of the text,
15 but it's consistent with the impetus for
16 enactment of the law. It's consistent with the
17 nondiscrimination principle. It's consistent
18 with the Court's characterization of the effect
19 of 3172(a) in Goodyear Atomic.

20 JUSTICE KAGAN: But then, I mean --

21 JUSTICE BARRETT: Mister --

22 JUSTICE KAGAN: -- all your stronger
23 arguments, I think, are non-textual arguments.
24 I mean, Goodyear -- Goodyear is a -- is a
25 sentence in a case that was not about

1 discrimination at all, so I think I'm going to
2 put that to one side at least.

3 You have very strong arguments about
4 the impetus of the law and you have very strong
5 arguments about, if this were read as the state
6 wants it to be read, it would stretch quite
7 broadly and -- and -- and -- and maybe just
8 seems like not the kind of thing that Congress
9 would do.

10 But, if you look at the text here, I
11 mean, I'm sort of struggling to read it your
12 way. It -- it -- as the Chief Justice says, it
13 just says, if the state were in charge, could
14 the state do it, and, obviously, the state
15 could.

16 MR. STEWART: Well, again, the -- the
17 law is -- is not directed at the state
18 legislature. It doesn't talk about what the
19 state legislature could enact. It's addressed
20 to the state authority charged with enforcing
21 and requiring compliance.

22 And so L&I's authority is limited to
23 the enforcement of laws that actually exist, and
24 so, if you ask what could L&I do on premises
25 within the exclusive jurisdiction of the state,

1 if the point of reference is other places within
2 the State of Washington outside the Hanford
3 facility, it is -- it -- it could not apply
4 presumptions of this sort because there's no
5 state law that authorizes it to do so.

6 Even if you're talking about the
7 circumstances in which you had a hypothetical
8 Hanford facility that it was on the same tract
9 of land but did not use federal contract
10 workers, used exclusively state and private
11 workers, L&I couldn't in any meaningful sense
12 enforce the presumptions as they are set forth
13 in HB 1723 because HB 1723 by its terms refers
14 to DOE Hanford site workers.

15 Even within that site, it's limited to
16 the federal contract workers on that site.

17 JUSTICE ALITO: To what extent does
18 your argument depend on identifying it as a
19 federal facility?

20 Suppose -- excuse me -- there is one
21 facility in a state where the -- the risk is
22 much higher than anyplace else in the state,
23 and, therefore, there's a justification for
24 flipping the causation requirement. And it just
25 so happens that the only workers working on that

1 site are federal workers, so the site is not
2 identified as a federal facility by name. It's
3 identified based on the characteristics of the
4 site that are thought to justify the change in
5 the causation rule.

6 Would there be a problem there?

7 MR. STEWART: I think there would be a
8 potential problem, but it's a much harder case.
9 And one of the things we would like to know in
10 that circumstance is, did the state single out
11 that facility because it was a federal facility,
12 or did it single it out because it truly
13 believed that the risks there were higher than
14 anywhere else?

15 And so, for --

16 JUSTICE ALITO: Yeah, okay, so it's --
17 it comes down to a question of legislative
18 intent?

19 MR. STEWART: I think, again, in those
20 circumstances. For -- to -- to take another
21 hypothetical, if a state imposed a -- a special
22 tax, a higher corporate income tax on profits
23 that private firms earned -- earn by producing
24 and supplying military equipment.

25 Now a law like that might not refer

1 specifically to the federal government, but it
2 would have an evident likelihood of
3 discriminating against federal contractors
4 because military equipment is most likely to be
5 bought by the federal government.

6 Now, if a state legislature tweaked
7 the definition of military equipment to ensure
8 that it swept in a little bit of stuff that was
9 typically bought by civilians, that shouldn't be
10 good enough to save it. But we acknowledge that
11 the law with respect to those types of statutes
12 is underdeveloped. They pose much harder
13 problems.

14 I think the reason that we have
15 pursued this case so vigorously is that it
16 seemed to us the easy case. It seemed to us a
17 case in which there were two forms of explicit
18 discrimination against the federal government.

19 JUSTICE BARRETT: On --

20 JUSTICE KAVANAUGH: What --

21 JUSTICE BARRETT: I'm sorry. Well,
22 this problem that Justice Alito is hypothesizing
23 and your answer goes to the potential problems
24 that you reserved in your breach -- brief with
25 respect to the new law, right?

1 MR. STEWART: Yes.

2 JUSTICE BARRETT: As if you're
3 treating -- and it's not a question of
4 legislative intent, right? It's a question of
5 looking at the facial classification and saying
6 are the desk workers at this site subject to any
7 greater risk than, say, firefighters or miners?
8 And it's -- it's a question of identifying the
9 relevant categories of risk?

10 MR. STEWART: That -- that would be
11 important, but it might also turn on legislative
12 intent. For example, in -- in the equal
13 protection area, even where it is necessary that
14 a plaintiff show intentional discrimination, I
15 was subject to adverse treatment because of my
16 race or sex, a plaintiff can sometimes make that
17 showing by establishing that the state adopted a
18 facial -- facially neutral criterion but adopted
19 it because it correlated with race or sex.

20 And that, I think, is rarely
21 successful, but it is commonly understood to be
22 an available method of proof even in equal
23 protection cases where the plaintiff has to show
24 intentional discrimination.

25 So I think at least part of the

1 inquiry with respect to SB 5890 would be did the
2 state single out this particular category of
3 workers because it understood that the large
4 majority of them would be federal contract
5 workers, or did it enact the law because it was
6 concerned with the dangers imposed by these
7 occupations without regard to the identity of
8 the -- the entity that would ultimately bear the
9 financial loss.

10 JUSTICE SOTOMAYOR: Counsel, you have
11 a presumption in your favor, the presumption
12 that a waiver has to clearly and unambiguously
13 waive governmental immunity. As my colleagues
14 have pointed out, the language here is a waiver
15 of immunity, but there is some ambiguity as to
16 what the extent of that waiver is.

17 And so, given that your -- that your
18 opposing counsel points to a number of statutes
19 that very clearly say you can't discriminate
20 against the federal facility or federal
21 employees, they have very express language about
22 being treated equally, which this statute
23 doesn't, why doesn't that show us, if it's an
24 ambiguity as to the scope, that the scope is as
25 broad as the language supports?

1 MR. STEWART: Well, first, I think the
2 general rule -- and this is not just with
3 respect to intergovernmental immunity. It
4 applies to immunities from suit generally under
5 decisions like FAA versus Cooper. The general
6 rule is even when Congress has clearly
7 manifested its intention to waive immunity to
8 some degree, disputes about the scope of that
9 waiver are themselves subject to the clear
10 statement requirement.

11 The second thing is we do think that
12 Congress manifested an intent to import a
13 principle of nondiscrimination into the statute.
14 That is, it defined what the state agency can do
15 on federal facilities with respect to what -- by
16 reference to what the state agency could do on
17 premises within the exclusive jurisdiction of
18 the state. And so we think it's natural to say
19 that was importing the nondiscrimination
20 requirement that has always been central to the
21 Court's intergovernmental immunity decisions.

22 The third thing I would say is we went
23 for 80 years after this statute was enacted
24 before any state appears to have read it to
25 authorize the sort of targeting of federal

1 facilities that Washington has done here. And
2 so, if the law were truly ambiguous or if the
3 better reading of the law were as the state
4 represents, we would have expected states to
5 explore their options before that time.

6 The fourth --

7 CHIEF JUSTICE ROBERTS: Well, but, I
8 mean, maybe it has to do with the fact that
9 there aren't very many places like Hanford,
10 right, where you have a situation where
11 basically anybody there is certainly subject to
12 great concern, unlike other places.

13 I mean, is -- are there analogous
14 places in the rest of the country where a state
15 might be concerned about the workers'
16 compensation regime --

17 MR. STEWART: I mean --

18 CHIEF JUSTICE ROBERTS: -- because
19 it's a particularly hazardous environment that
20 -- that people have been working in?

21 MR. STEWART: -- I don't know of
22 specific analogues to Hanford. Now Congress has
23 enacted a statute of its own, the EEOICPA, which
24 is not Hanford-specific, but it's specific to
25 workers in the atomic weapons sector. It -- it

1 encompasses people like some of the Hanford
2 workers. It also encompasses people engaged in
3 uranium milling or mining. So there certainly
4 are other workplaces within the country that --
5 where workers are subject to some of the same
6 dangers.

7 But the -- the whole point of the
8 antidiscrimination principle is that in
9 circumstances where it's apparent that the
10 federal government is going to be fitting the
11 bill, states may often feel a temptation to kind
12 of benefit some class of their own residents to
13 an exorbitant degree with the understanding that
14 they won't be -- the state itself won't be
15 required to absorb the costs.

16 The last thing I would say about
17 Goodyear Atomic -- and I agree with you, Justice
18 Kagan, that the point at issue in that case was
19 not whether a discriminatory state law would
20 pass constitutional review. Nevertheless, the
21 fact that this was this Court's instinctive
22 reaction to what the language meant should tell
23 you that it's at least a plausible reading.

24 And I'd also point out that Congress
25 re-codified the provision with some minor

1 changes in the interval within -- between
 2 Goodyear Atomic and the present, suggesting that
 3 Congress was satisfied to read the statute as
 4 imposing a non-discrimination requirement.

5 JUSTICE KAGAN: What -- what do you
 6 think this statute would have to look like for
 7 it to mean what the State of Washington says
 8 this one means?

9 MR. STEWART: I mean, I think it would
 10 have to say something like the state legislature
 11 and/or the state authority can impose on
 12 facility -- federal facilities or facilities
 13 within the exclusive jurisdiction of the
 14 government whatever workers' compensation laws
 15 they choose and to make doubly sure it might say
 16 without regard to principles of
 17 intergovernmental immunity.

18 And I think that's another textual
 19 point that under the state's view of the law,
 20 it's really not clear what work the -- the
 21 language about "in the same way and to the
 22 extent" as if the premises were within the
 23 exclusive jurisdiction --

24 JUSTICE KAGAN: I mean --

25 MR. STEWART: -- of the state to do

1 it.

2 JUSTICE KAGAN: -- when you said
3 especially, you know, to be double sure it has
4 to refer to waiver of immunity, I mean, do you
5 think that the statute basically, given the
6 breadth of this -- of -- of what the State of
7 Washington is saying here, that there has to be
8 an express waiver of immunity?

9 MR. STEWART: Well, I think, with
10 regard to antidiscrimination in particular, that
11 is, it's relatively commonplace for the United
12 States to engage in the sort of waiver that we
13 think it engaged in here, namely, a -- an
14 authorization for the state to apply -- apply
15 certain of its own laws evenhandedly to federal
16 facilities, it requires some express
17 congressional authorization, but it's not
18 especially unusual.

19 We don't know of any analogue to a
20 hypothetical version of 3172(a) that would tell
21 the state: You can impose discriminatory
22 workers' compensation laws on federal
23 facilities.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything?

2 Justice Breyer?

3 Justice Alito?

4 Justice Sotomayor, anything?

5 Justice --

6 JUSTICE BARRETT: I do have one.

7 Mr. Stewart, I just want to make sure
8 that I understand the textual hook because it's
9 been pointed out the statute's not a model of
10 clarity, but I guess, for one, I do see a
11 textual hook for your argument, and I want to be
12 sure that I'm correctly understanding it.

13 You say that 3172 is aimed at the
14 executive essentially, not at the legislature.
15 And you get that from this language that says
16 state authority charged with enforcing and
17 requiring appliance -- compliance with, in the
18 beginning, and then awards of the authority may
19 apply the laws of all land -- to all land and
20 premises in the state which the federal
21 government controls.

22 So yours isn't completely unmoored
23 from the statute and rooted in purposes, right?

24 MR. STEWART: Yes. I mean, I think --
25 I think what -- what it is saying is the state

1 authority here, L&I, can apply whatever
2 substantive body -- can apply to the federal
3 facility whatever substantive body of worker
4 compensation rules it could apply in the other
5 parts of Washington that are within the
6 exclusive jurisdiction of the state.

7 JUSTICE BARRETT: So the limitation --
8 so your position is that if there's an otherwise
9 existing extant body of generally applicable
10 law, the Washington agency charged with
11 enforcing that law can apply that extant body of
12 law to federal facilities and that that's what
13 3172 authorizes by that language that I just
14 quoted?

15 MR. STEWART: Yes. And the only
16 clarification I would make is, when we say
17 "extant," certainly, Washington could update its
18 state laws even after 3172(a) was enacted.

19 It's not like the Federal Enclave
20 Doctrine, where you look at a certain point in
21 time and you ask --

22 JUSTICE BARRETT: Right.

23 MR. STEWART: -- what state laws were
24 in effect there. But so long as it does that on
25 an evenhanded basis, the Washington

1 administrative agency can apply to the federal
2 facility the same laws it is authorized to apply
3 in the rest of the state.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. STEWART: Thank you, Mr. Chief
8 Justice.

9 CHIEF JUSTICE ROBERTS: Ms. Heintz.

10 ORAL ARGUMENT OF TERA M. HEINTZ
11 ON BEHALF OF THE RESPONDENTS

12 MS. HEINTZ: Mr. Chief Justice, and
13 may it please the Court:

14 To protect workers on federal projects
15 like the Hanford cleanup, Congress passed a
16 waiver statute that allows states to regulate
17 federal contractors using all the same tools we
18 can use as to any private actor.

19 That waiver allowed Washington's
20 former law that is challenged here. But,
21 ultimately, this Court need not decide this
22 issue because this case is moot.

23 The federal government is asking you
24 to issue a constitutional ruling invalidating a
25 state law that no longer exists and that has no

1 ongoing effect.

2 This Court should decline and should
3 instead vacate the decisions below and remand
4 for further proceedings.

5 The government concedes that there is
6 no prospective relief that this Court can grant
7 as to Washington's former law because the state
8 has already eliminated the provisions that are
9 challenged here.

10 The only reason the government argues
11 that there is still a live controversy is
12 because it assumes that invalidating
13 Washington's former law could still impact the
14 small number of pending claims that were
15 initially filed under the old law.

16 That is incorrect. Washington's
17 presumption statute applies retroactively, so
18 the revised law will govern any pending claims
19 for benefits initially filed under the former
20 law, even those cases on appeal.

21 The government speculates that there
22 may be individuals whose pending claims were
23 filed under the old law and that would not be
24 covered under Washington's revised statute. But
25 even if that were true, those claims would now

1 be rejected under Washington's revised statute.

2 Thus, if this Court were to reach the
3 merits and either uphold or invalidate
4 Washington's former law, it will have absolutely
5 no effect on any workers' right to benefits or
6 the government's finances. This case is moot.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Counsel, wouldn't
9 your case be much stronger if what you just said
10 had been found to be the case by the Supreme
11 Court of Washington?

12 MS. HEINTZ: Your Honor, what I did
13 say has been found at least in principle by the
14 Washington State Supreme Court.

15 JUSTICE THOMAS: No, I mean in the
16 context of the statutes that we're talking
17 about.

18 MS. HEINTZ: Certainly. If the
19 Supreme Court had issued a ruling directly on
20 point in this case, it would be stronger. But
21 what we're asking this Court to acknowledge is
22 settled principles of Washington and federal law
23 that when a statute is retroactive, and the
24 statute here is expressly retroactive, when it
25 is retroactive, then courts have an obligation

1 to the legislature or Congress to honor that
2 retroactive intent and to apply that law to all
3 pending cases, even if it ultimately changes the
4 outcome.

5 JUSTICE THOMAS: But do -- do you
6 think a -- a -- a -- someone who has benefitted
7 from the old law and who would like their
8 benefits updated for changed circumstances would
9 agree with you, or would they rather simply
10 pursue their case under the law -- under the old
11 law, which was the basis for their benefits in
12 the first -- in the first instance?

13 MS. HEINTZ: Your Honor, I have two
14 points.

15 First, a -- a worker that had
16 previously had a claim under the old law would
17 not have a vested right to fight a retroactive
18 application of the new law until there has been
19 a final judgment.

20 Once there's a final judgment, then
21 there's a due process right that is vested and
22 there can be an argument by the worker. But, as
23 to all pending claims, there is no such vested
24 right, and so there is no argument by the worker
25 that the law cannot retroactively apply to those

1 claims.

2 As to the closed claims -- and there's
3 about 160 of those claims -- approximately,
4 sorry, 140 of those claims -- those claims have
5 been adjudicated now to final judgment. The
6 federal government had every opportunity to
7 challenge the constitutionality of the old law
8 in those cases. It chose not to do so, and
9 those claims are now final.

10 So there is no ability by the federal
11 government to relitigate the constitutionality
12 of the old law in those cases. There is a small
13 exception under Washington law that allows a
14 worker to reopen only the amount of the benefits
15 or the need for additional medical services, but
16 that does not allow relitigation of the
17 determination that they suffered an occupational
18 injury.

19 Res judicata would still bar
20 relitigation and the federal government
21 challenging the underlying statute so that if
22 this Court issues a constitutional ruling, it
23 will have no impact either on the pending claims
24 or on the claims that are already closed, which
25 is a closed universe of only 200 claims total,

1 66 which are pending and approximately 140 that
2 are closed.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Well, I mean,
5 your argument depends upon a prediction about
6 what the Washington State Supreme Court is going
7 to do.

8 MS. HEINTZ: Yes, Your Honor, to some
9 extent, but this is settled law. We're not
10 asking you to accept our opinion on the issue.
11 The Supreme -- State Supreme Court has been very
12 clear in Estate of Pemberton, and it follows
13 settled federal law on this issue that when
14 legislation is enacted and it is intended and
15 explicitly retroactive, the courts have an
16 obligation to the legislature to apply that law
17 retroactively.

18 CHIEF JUSTICE ROBERTS: Well, but we
19 have pretty rigorous standards when,
20 particularly after a grant of certiorari, the
21 respondent undertakes certain efforts to moot
22 out the case. It has to be -- I forget what our
23 language is -- you know, beyond any doubt or
24 something like that.

25 And I think, as you just candidly

1 acknowledged, there are a number of cases where
2 the issue would still be alive, and however
3 confident you are about your prediction of your
4 state supreme court, you know, sometimes
5 predictions don't pan out. Courts do unusual
6 things.

7 MS. HEINTZ: Understood.

8 CHIEF JUSTICE ROBERTS: So isn't that
9 -- isn't that enough of a continuation of the
10 impact of the controversy given the rigorous
11 nature of our standards?

12 I mean, I -- I don't -- I don't want
13 to suggest that the legislature is engaging in
14 some kind of a gambit, but maybe it was a
15 sincere effort to make our workload better, but
16 it -- it -- it is not totally -- the case is not
17 totally out of, you know, any significance at
18 all, I don't think.

19 MS. HEINTZ: Your Honor, I would have
20 two responses.

21 First, I would just point out that
22 Washington's legislature is just a part-time
23 legislature. They only meet for a couple of
24 months each year. And so, since the last time
25 the legislature met and the legislation --

1 legislative session that started earlier this
2 year, there have been a number of significant
3 events that have crystallized and narrowed the
4 federal government's complaints -- claims. And
5 so the state legislature was responding in good
6 faith to those developments and -- and trying to
7 ensure the continuity of benefits.

8 But, as to your other question, Your
9 Honor -- my apologies, your other question was
10 about the state --

11 CHIEF JUSTICE ROBERTS: Don't expect
12 me to remember it.

13 (Laughter.)

14 MS. HEINTZ: When the state
15 legislature acts here or about the retroactive
16 application.

17 CHIEF JUSTICE ROBERTS: Right.

18 MS. HEINTZ: This is a much more
19 attenuated case than this Court considered in
20 the New York State Rifle Association.

21 Here, there is no claim of a live
22 controversy in the case-in-chief. The federal
23 government only sought an invalidation and a
24 declaratory judgment. They asserted no damages
25 here. They're not claiming they can assert

1 damages. So they're talking about potential
2 collateral consequences in other cases that are
3 based on a number -- a series of speculative
4 events that might occur in the future.

5 If a office worker tries to reopen
6 their case, if the Washington courts determine
7 that there is no -- that the statute -- the new
8 statute and the old statute are not coextensive,
9 if that office worker's claim falls within the
10 gap of the coverage, if Washington courts do not
11 apply res judicata to preclude relitigation of
12 their claims, then maybe there might be some
13 ongoing application.

14 But that is not the type of live case
15 or controversy and present controversy that this
16 Court has ever held as sufficient for Article
17 III purposes.

18 JUSTICE BARRETT: Counsel, if you say
19 it's so clear, I mean, I thought the government
20 made what I thought was a decent point in its
21 letter response. You didn't identify this
22 retroactivity argument until your fourth
23 submission regarding mootness. And if it was
24 that clear, why did you wait so long to make it?

25 MS. HEINTZ: Yes, Your Honor. And the

1 State sincerely regrets that and wishes that we
2 had raised that issue sooner.

3 To be clear, the State understood
4 immediately that this statute was retroactive.
5 What took a little longer to understand and
6 which we learned in the course of implementing
7 the law was that the state courts would apply
8 this retroactive legislation to all pending
9 claims on appeal, even if it means changing the
10 outcome of the litigation.

11 And that was an oversight, but there
12 is no uncertainty in the state of that law.
13 That is settled Washington law. It follows
14 settled federal law. There is no real ambiguity
15 about the application of that law.

16 JUSTICE KAGAN: Well, one of the
17 arguments you make in your briefing is that even
18 if we find that this does not raise to our very
19 high bar of mootness that we should vacate this
20 case. And I want to know whether you found any
21 precedent for us to do something like that at
22 this stage.

23 MS. HEINTZ: Well, Your Honor, there
24 is certainly precedent that the Court has broad
25 jurisdiction to -- to decide the issues that

1 sort of merit this Court's consideration. And I
2 think particularly where, as here, it would
3 require invalidating the laws of a sovereign
4 state, there are factors that would suggest that
5 this Court, even if it doesn't find it moot,
6 certainly finds that the stakes have been
7 substantially decreased, and it does not warrant
8 invalidating a state statute.

9 JUSTICE GORSUCH: I -- I --

10 MS. HEINTZ: Part --

11 JUSTICE GORSUCH: -- I understand the
12 argument that we might dismiss the case if -- if
13 it's not moot but -- but for some reason no
14 longer of great significance. And I -- I think
15 that was your response to Justice Kagan.

16 But you're asking us to vacate a
17 judgment, and if it isn't moot and it isn't
18 wrong, on what authority could we do so?

19 MS. HEINTZ: Because that is what the
20 Court has done in the past when there's been a
21 change of the legislative scheme. That is the
22 reason that the case has been mooted out. So --

23 JUSTICE GORSUCH: Well, moot --
24 mootness, yes.

25 MS. HEINTZ: Yeah. Oh --

1 JUSTICE GORSUCH: But I think Justice
2 Kagan's question -- and this is -- this is why
3 I'm -- I'm popping up -- is I think Justice
4 Kagan's question, if I understand it correctly,
5 is suppose it isn't moot. Suppose we have a
6 live controversy, small though it may be, some
7 still live, all right, and suppose we think the
8 judgment below is correct.

9 How can we vacate it?

10 MS. HEINTZ: The Court would have -- I
11 don't know the -- the grounds on which this
12 Court would vacate it.

13 JUSTICE GORSUCH: Neither do I.
14 That's why I'm asking you.

15 (Laughter.)

16 MS. HEINTZ: Understood. Understood,
17 Your Honor.

18 JUSTICE GORSUCH: Okay. All right.
19 If you don't know the answer to that question,
20 good. That makes me feel better because I don't
21 either. All right.

22 MS. HEINTZ: Thank --

23 JUSTICE BREYER: Can I ask you, what
24 they say and -- look, there are -- we assume
25 this new law sweeps back and avoids this

1 problem, okay? But they say there are 66
2 people, maybe there are a few more, a few less,
3 there's 66 people who worked at Hanford. They
4 sued under the own -- old law. They got
5 compensated under the Washington statute and
6 those are on appeal.

7 And you say do not worry because, as
8 to those 66 cases, this new law will come along,
9 and since it says it's retroactive, it will
10 apply to them too, and they'll follow that and
11 the thing will be wiped out.

12 All right. But they say: Read the
13 new law and read the old law. The old law
14 applies where there is -- what is it? It's --
15 it's -- it's geographically defined the area
16 where it applies, it's Hanford's decision,
17 geographic areas which collectively span
18 hundreds of miles. The new law applies to
19 workers who work at any structure and its lands.

20 So, when I read that, I think maybe
21 there are several federal workers who are busy
22 on a river at Hanford cleaning out muskrat nets
23 -- nests, okay, and they are nowhere near a
24 structure where particular forms of waste are
25 disposed of, expect -- except by the muskrats,

1 which have nothing to do with this, okay?

2 So they say: Well, how do we know
3 they're going to be wiped out? And you say:
4 Well, because there's clear Washington law on
5 that subject.

6 I would be willing to bet that there
7 isn't clear law on the geographical scope of
8 muskrat nets -- nests in the State of
9 Washington. So, when I read that, I thought: I
10 don't know. And, therefore, I couldn't. Now
11 that's my problem with your argument, and if
12 it's a real problem, well, then I can't really
13 say it's moot.

14 MS. HEINTZ: I understand, Your Honor,
15 and there are actually two separate mootness
16 arguments here. The much more straightforward
17 argument is that because this law applies
18 retroactively, whether or not the worker who has
19 a pending claim, whether they can continue to
20 assert that claim under the new law will be
21 determined solely by application of that new
22 law.

23 It requires no reference to the old
24 law at all. You just have to look at the
25 geographic scope of the new law. If they have a

1 claim --

2 JUSTICE BREYER: These claims they
3 already got. They were paid. And the
4 government wants its money back.

5 MS. HEINTZ: Yes, Your Honor, but the
6 retroactive application means that it says, oh,
7 the new law didn't -- the old law doesn't exist.
8 And so, if they have a claim under the new law,
9 they can proceed. If they don't, they -- they
10 can't.

11 JUSTICE BREYER: Oh, I get it. Okay.

12 MS. HEINTZ: Yeah.

13 JUSTICE BREYER: So your point is
14 Washington law is absolutely clear. This is a
15 situation, it said, retroactive in the new law.
16 So even if you won in 14 courts in -- because
17 they're stacked up there in Washington, and
18 you're now at court number 13 and, yeah, you
19 win, you win, you win, bad luck, the
20 government's going to come in and we will say in
21 -- the government will say only the new law
22 applies; it doesn't matter whether you're
23 working on muskrat nests or any -- either you
24 were or you weren't. And if you were, then bad
25 luck. And if you weren't -- okay.

1 MS. HEINTZ: Exactly.

2 JUSTICE BREYER: And the authority for
3 that under Washington law is?

4 MS. HEINTZ: Estate of Hamberton,
5 which follows the Pluit case.

6 JUSTICE BREYER: Okay. Go ahead.

7 MS. HEINTZ: And that is settled law,
8 and it's settled in multiple different cases.

9 JUSTICE BREYER: Got it.

10 MS. HEINTZ: So these are two separate
11 mootness arguments.

12 JUSTICE ALITO: I -- I appreciate your
13 concern that we not exceed our Article III
14 jurisdiction and decide something that's not a
15 live case or controversy. But, other than that
16 abstract concern, why do you care? If this old
17 law is void, dead, has no effect, why are you
18 fighting so hard to prevent us from considering
19 its status?

20 MS. HEINTZ: Your Honor, I mean, the
21 state has an interest in ensuring that this
22 Court address live cases or controversies. And
23 -- and we do still believe that the way -- the
24 old law fell within the scope of the waiver.
25 It's just no longer a live case or controversy.

1 But, as acknowledged, the waiver
2 language is very broad. It uses the term
3 "exclusive jurisdiction of the state." That
4 language does not really permit distinguishing
5 between different types of intergovernmental
6 immunity, as -- as would be suggested by the
7 government.

8 JUSTICE ALITO: Well, do you think it
9 allows -- it allows a state to single out a
10 federal facility by name?

11 MS. HEINTZ: Your Honor, it could do
12 that -- if the state could do that with respect
13 to a private actor, which we think the state
14 could, then it is permitted by -- under this
15 waiver provision.

16 And I would just note that at the time
17 that this waiver statute was initially passed in
18 1936, states had already adopted workers'
19 compensation schemes that chose -- that treated
20 different employers differently based on their
21 circumstances.

22 JUSTICE ALITO: Well, the state could
23 single out a private facility, and that -- the
24 only -- what would be the defense against that?
25 Rational basis economic -- equal protection

1 review. That's it. So, basically, you think
2 that this means nothing.

3 MS. HEINTZ: I think that this waiver
4 permits differential treatment of the federal
5 government because it permits everything that
6 the state could do with respect to a private
7 actor.

8 JUSTICE KAGAN: And it could do that
9 --

10 CHIEF JUSTICE ROBERTS: Why --

11 JUSTICE KAGAN: -- with respect to
12 federal employees, yes, not just employees of
13 contractors?

14 MS. HEINTZ: No, Your Honor. The
15 federal employees are governed by a separate
16 federal statute, the Federal Employee
17 Compensation Act, which has a preemption
18 provision. So this statute, even from the time
19 it was first passed, only ever applied to
20 federal contractors, which are private
21 employers. And so Congress understood that at
22 the time --

23 JUSTICE KAGAN: Well, but if you look
24 at the language of this statute and if you take
25 it to be as broad as you say the language is,

1 why wouldn't -- why would preemption principles
2 apply?

3 MS. HEINTZ: Your Honor, because
4 preemption -- I have two responses, but, first,
5 preemption applies even under the state's
6 exclusive jurisdiction. So what you're looking
7 at is what the state could do with respect to a
8 private actor on state land.

9 Even in those situations, the state
10 cannot conflict with federal law. It is still
11 bound to ensure that it doesn't interfere or
12 conflict with federal law. It would similarly
13 -- those preemption principles would apply under
14 this.

15 And so, as this Court recognized in
16 North Dakota v. United States, preemption and
17 intergovernmental immunity are two separate
18 obstacles or barriers to state regulation of
19 federal contractors.

20 JUSTICE BARRETT: I don't understand
21 where it is that the state has exclusive state
22 jurisdiction. Maybe I'm just being dense about
23 this, but it seems to me that the Supremacy
24 Clause stretches everywhere.

25 So you just said in response to

1 Justice Kagan that preemption wouldn't apply if
2 it was the state's exclusive jurisdiction.
3 Wouldn't that presuppose that Congress had
4 already waived some sort of immunity or already
5 said we just cede our authority over this
6 particular piece of territory to the state?

7 MS. HEINTZ: Your Honor, preemption
8 principles would apply. So this does not waive
9 preemption. This waives only intergovernmental
10 immunity and territorial jurisdiction, and those
11 are incidents of federal jurisdiction.

12 But even in the state's exclusive
13 jurisdiction when it's regulating a private
14 actor on state land, it is still bound to comply
15 with other federal statutes. So --

16 JUSTICE BARRETT: But the state
17 doesn't have exclusive jurisdiction, right,
18 except insofar as Congress may allow it to?

19 MS. HEINTZ: Right, Your Honor, and so
20 the "exclusive jurisdiction of the state," that
21 term is referenced to a virtual control that
22 generally occurs with state regulation of
23 private actors on state land.

24 There is still, like, constitutional
25 limitations and limitations of federal statutes

1 that apply in those situations, but territorial
2 limitations and limitations of intergovernmental
3 immunity would not apply.

4 JUSTICE BREYER: Well, how could --

5 JUSTICE BARRETT: But you're saying
6 that this would be so -- that -- that -- that
7 the federal government was so deferential to the
8 states here that if we read the waiver as you
9 propose, Congress is essentially saying to the
10 states you can impose whatever rules of workers'
11 compensation liability you want.

12 So, here, you could say it was strict
13 -- strict liability because this was a really
14 hazardous site, and so, if there's any kind of
15 injury suffered by a federal contractor on this
16 site, you know, there might be an award of a
17 million dollars, that would be fine.

18 MS. HEINTZ: It would depend on if the
19 state could do that with a private regulator.

20 JUSTICE BARRETT: Let's say it could.

21 MS. HEINTZ: Yes. So, in that
22 circumstance, this doctrine would not provide a
23 limitation. If there was a conflict with some
24 other federal statute -- and there are often
25 federal statutes at play when you're talking

1 about significant federal functions or federal
2 enclaves. There's all kinds of statutes that
3 would be at play.

4 If there was a conflict with one of
5 those federal statutes, then that would still be
6 a limitation, but intergovernmental immunity
7 would not be that limitation. And Congress was
8 just making the determination that states could
9 use the full authority that they have over any
10 private or -- or state actor or employee and
11 apply the same rules that they would apply in
12 those circumstances --

13 JUSTICE BREYER: But there is a
14 different --

15 MS. HEINTZ: -- to the private --

16 JUSTICE BREYER: -- I mean, that is
17 exactly the question that is bothering me. I
18 mean, one day in the legislature a group of
19 federal employees from Hanford show up and they
20 say: You know, it's tough being a federal
21 employee. People in the state make much more
22 money. We have more dangerous jobs.

23 And the state laws generally are
24 pretty fair to their workers, but try working
25 for the federal government. This is supposed to

1 strike a chord of agreement.

2 So they say: Now you can't do much
3 for us because you're a state legislature, but
4 I'll tell you one thing you can do. What you
5 could do for you is you give us, if we're hurt,
6 and define hurt very broadly, please, so that if
7 we're even hurt a little bit, we get millions.

8 Now we've got to watch that number
9 because -- but -- but, really, it's high. And
10 you know the wonderful thing? If you make
11 private employers pay this in the State of
12 Washington, they are voters, so you have to
13 worry about them.

14 And if the government pays for it in
15 the state, well, that's a problem, you're going
16 to have to raise taxes. But do you know who's
17 paying for this one? The feds. The feds will
18 pay, the taxpayers in the other states. So
19 let's go and really hit the ceiling and we'll
20 really pay a lot of money and we won't have to
21 pay for it.

22 Okay. I know projects like that. I
23 won't say which they are, but there we are.

24 Now, to me, did I think Congress
25 intended that? Hmm. It's going to take quite a

1 lot of doing before I think they wanted that
2 result. Now that's -- that's where I am. So
3 what do you think?

4 MS. HEINTZ: Understood, Your Honor.
5 Congress has the ultimate political check here.
6 They can always amend this statute, but they
7 used very broad language. They used the term
8 "exclusive jurisdiction of the state."

9 They knew it was very broad language.
10 That exact term was used in Merrick v. Garland
11 -- Garrick, so the case that they were
12 responding to used exactly that same type of
13 language. They understood that they were
14 granting a broad authority.

15 If they don't like the policy later,
16 they can amend the statute. But that is not a
17 basis to ignore the plain terms of this
18 language, which allows a state to treat the
19 premises as if it were under the exclusive
20 jurisdiction of the state.

21 JUSTICE KAGAN: Ms. Heintz, I think
22 the question was really a question of, like, you
23 know, maybe you're right about the text, but why
24 would Congress have done that? I mean, we can't
25 really believe that that's what Congress meant

1 to do.

2 And if you take all the other statutes
3 which you gave us and you said, look, the text
4 is different, and you're right, the text is
5 different.

6 But, at the same time, we know that
7 Congress has a kind of modus operandi with
8 respect to this, and it basically always says
9 whatever you do elsewhere, you can do for
10 facilities like Hanford.

11 It doesn't say, you know, whatever you
12 could dream of doing elsewhere but actually
13 wouldn't you could do to federal facilities.
14 And I think that that's what Justice Breyer is
15 asking. Like, what sensible Congress would have
16 written the statute the way you say it ought to
17 be read?

18 MS. HEINTZ: Well, there number -- are
19 a number of points, Your Honor. They were
20 regulating primarily private employers, and so
21 they could have reasonably assumed that those
22 private employers who act as federal contractors
23 did have some say in the legislative process,
24 which is evident here too. The -- the federal
25 contractors did participate in the state

1 legislative process.

2 And, second, Congress could very well
3 conclude that the type of workers' compensation
4 schemes that had already been enacted by the
5 states, which allows distinguishing between
6 different employers based on the specific risks
7 of that employer, based on their specific safety
8 profiles, based on all of the distinctive
9 features of that employer, that that should
10 apply with as much force to these private
11 entities that were governed by this waiver.

12 And -- and that's a very reasonable
13 decision. Maybe Congress did not anticipate
14 that it would be taken this far, but we're not
15 really doing anything differently than what was
16 permitted before in that Hanford is a unique
17 site. It is the most toxic workplace in
18 America.

19 There -- you know, the employers there
20 are around 56 million gallons of toxic and
21 radiological hazard waste and they have unique
22 exposures. And -- and another thing is that
23 they can't always prove what they were exposed
24 to, and that's one of the other unique dangers
25 here.

1 And so Congress could very well have
2 concluded that the federal contractors, these
3 private employees -- employers could take care
4 of themselves and that there was every reason to
5 allow states to regulate these private employers
6 based on their specific circumstances.

7 JUSTICE BARRETT: Ms. Heintz, what do
8 you have to say to the government's language or
9 focus on the language that makes it seem like
10 this is aimed not at the legislature -- and by
11 "it," I mean 3172 -- is aimed not at state
12 legislatures but at the state bodies who enforce
13 otherwise generally applicable laws?

14 MS. HEINTZ: So the argument seems
15 primarily directed towards the word "apply."
16 And I think that argument --

17 JUSTICE BARRETT: Well, I think
18 enforcing and requiring compliance was too,
19 right?

20 MS. HEINTZ: Yes. But that language
21 presupposes there's a statute that's already
22 been enacted. And the federal government
23 doesn't argue that this language freezes the
24 laws in place as of 1936, which would be the
25 consequence, I think, of not permitting states

1 to enact new laws.

2 JUSTICE BARRETT: I guess I don't
3 understand why that position would freeze the
4 law. I agree with you, and the government, Mr.
5 Stewart, said that's not their position, and I
6 don't see how it could be.

7 But, if the statute is aimed at the
8 state authority charged with enforcing and
9 requiring compliance with, that description
10 seems to fit, you know, the executive agency.

11 MS. HEINTZ: Because, at the time that
12 this law was enacted, there was a broad
13 prohibition on any form of regulation of the
14 federal government or those with which it dealt.

15 And so, if Congress intended at that
16 time for this language to prohibit state
17 legislators from doing anything, then they --
18 then this would have very little meaning. It
19 would only have applied to the laws that were
20 existing at the time. It could --

21 JUSTICE BARRETT: So "apply," then
22 address what you were getting ready to say about
23 the word "apply."

24 MS. HEINTZ: That the word "apply"
25 really does presuppose that there's been an

1 enactment -- and -- of a law. And so what you
2 really need to do is see what kind of law can --
3 can the states enact and then apply.

4 And, really, there's no -- the word --
5 term "exclusive jurisdiction" does not allow for
6 a distinction between different types of
7 intergovernmental immunity.

8 This Court in Goodyear has already
9 held that this is a waiver of intergovernmental
10 immunity. It's a clear and unambiguous waiver
11 at least as with respect to direct regulation.

12 And this language really doesn't allow
13 you to distinguish between these different
14 types. If the state can directly regulate under
15 its exclusive jurisdiction, it can also, you
16 know, remove all other incidents of federal
17 jurisdiction, including all of intergovernmental
18 immunity.

19 JUSTICE GORSUCH: I just want to make
20 sure I understand your mootness argument. Sorry
21 to circle back.

22 But your first point is -- I take it,
23 is that in this case, the government only sought
24 a declaratory judgment and injunction, and
25 there's nothing to declare and there's nothing

1 to enjoin because the statute's gone, point one.

2 MS. HEINTZ: Yes.

3 JUSTICE GORSUCH: Point two, with
4 respect to the ongoing other cases, you're
5 confident you're representing to the Court that
6 Washington state courts will retroactively apply
7 the new law and not the old law?

8 MS. HEINTZ: Yes, Your Honor.

9 JUSTICE GORSUCH: Okay. And, number
10 three, if you're wrong about that, the
11 government can raise its arguments there?

12 MS. HEINTZ: Yes, Your Honor.

13 JUSTICE GORSUCH: And number four,
14 that with the closed cases, they're just closed
15 and the government lost its chance to make those
16 arguments because they're final judgments?

17 MS. HEINTZ: Yes, Your Honor.

18 JUSTICE GORSUCH: All right. I got
19 it. Thank you.

20 MS. HEINTZ: Thank you.

21 JUSTICE KAGAN: Do you think there's
22 any way of certifying this issue to the
23 Washington Supreme Court about what they will
24 do?

25 MS. HEINTZ: I understand that that

1 has happened before in the past. It -- it --
2 it's been a long time, but I -- I believe there
3 is a -- a procedure available to do that, yes.

4 I don't think it's necessary. The
5 state law is very clear on this point. The
6 federal government is not really challenging
7 that law. They're not challenging the actual
8 language of the statute, which applies
9 retroactively.

10 They're raising sort of an inchoate
11 uncertainty, but that isn't sufficient, I think,
12 in a -- to present a live case or controversy,
13 particularly when that alleged uncertainty deals
14 with the collateral case, not this
15 case-in-chief.

16 Here, there is no ongoing violation.
17 There are no damages. And so, in this case,
18 there is no reasonable likelihood of an ongoing
19 effect.

20 JUSTICE ALITO: But what if your
21 prediction turns out to be wrong?

22 MS. HEINTZ: Then the federal
23 government can raise that issue in the cases,
24 the 66 live cases.

25 JUSTICE ALITO: Yeah. And then what?

1 MS. HEINTZ: And then -- and then the
2 arguments will be made. But in that context,
3 the state will also be arguing, as would the
4 federal government, this does apply
5 retroactively.

6 JUSTICE ALITO: Well, no, play it all
7 out. So they raise it, and the state court says
8 no, the prediction was wrong. Then what?

9 MS. HEINTZ: Then it would -- at least
10 at that point, you will know there's a live case
11 or controversy.

12 JUSTICE ALITO: Yeah. And then what?
13 They have to file a new cert petition?

14 MS. HEINTZ: If the state courts
15 decide similarly, given the history the -- in
16 this case. It could happen. But I think there
17 is no reasonable likelihood of that happening,
18 that these -- these -- again, multiple levels of
19 speculation that are built in, because even in
20 the context where there's no retroactive
21 application, we still have our argument that the
22 statutes are coextensive.

23 And even if the courts reject that,
24 that particular worker's claim needs to fall in
25 the gap of that coverage. We're talking a

1 closed universe of a very small number of
2 claims. So there are multiple layers in which
3 this gets resolved based on state law grounds
4 that never have to reach the invalidity of the
5 underlying statute.

6 And so, given all of that layer of
7 speculation, it really isn't sufficient to
8 establish a live case or controversy in this
9 case.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Breyer? Anything further?

14 Justice Alito? Anything?

15 Justice Gorsuch? Nothing?

16 Thank you, counsel.

17 MS. HEINTZ: Thank you.

18 CHIEF JUSTICE ROBERTS: Rebuttal,
19 Mr. Stewart?

20 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
21 ON BEHALF OF THE PETITIONER

22 MR. STEWART: Thank you, Mr. Chief
23 Justice.

24 First, Respondents have said -- have
25 characterized our challenge as focusing on the

1 potential collateral consequences of HB 1723.

2 But when we sought declaratory and injunctive
3 relief at the outset against enforcement and
4 application of HB 1723, that is a law that is
5 applied and enforced in the context of
6 individual benefits determinations.

7 And so the very thing we were asking
8 for was an order saying don't apply and enforce
9 these unique standards in determining individual
10 claimants' entitlement to benefits. Our
11 position is there is still a sufficient
12 possibility that this will wind up happening,
13 that the case is not moot.

14 The second thing is that, Justice
15 Kagan, you referred to the possibility of
16 certification. And, certainly, there is a
17 process by which this Court can certify state
18 law questions to the -- the state supreme court.
19 It's often done when the Court feels that it
20 needs to know what state law dictates before it
21 can resolve the federal question.

22 I've never known of it being done to
23 inform the Court's determination whether a case
24 is moot, and I think that's partly because cases
25 like Mission Products really set the -- the

1 applicable framework. Mission Products says the
2 very existence of substantial uncertainty is a
3 basis for finding the Court not to be moot. It
4 is often the case that when the Court grants
5 cert on -- on a precise question, the ultimate
6 practical consequences of its ruling are not
7 clear because those depend on subsequent
8 determinations as to other questions. That
9 doesn't make the case moot.

10 The third thing, Justice Gorsuch, you
11 asked about what would the authority be to
12 vacate. We -- we think that the Court has
13 recognized a -- a broad authority to vacate
14 based on the principles of equity. Often when
15 the Court has vacated judgments below, it's done
16 so in summary orders, and therefore the -- the
17 legal principles have not been fleshed out as
18 much as they could be.

19 But we would also say if there is
20 doubt about the Court's authority to vacate, the
21 Court certainly shouldn't leave the judgment
22 intact. It would really create dismal
23 incentives to tell a state that if you can
24 reduce the practical significance of the
25 question presented enough for the Court to DIG

1 but not enough for the Court case to be moot,
2 you can preserve your favorable judgment.

3 The fourth thing, just as a point of
4 clarification, Justice Kagan, you asked about
5 federal employees. Section 3172(c) says that
6 the authorization doesn't disturb Section 8101
7 of Title 5. And that's the Federal Employees'
8 Compensation Act. It's apparent on the face of
9 3172 that this doesn't affect federal employees.
10 It affects only federal contract workers.

11 But the reason that the Court has
12 always framed the antidiscrimination principle
13 as no discrimination against the federal
14 government or those with whom it deals is that
15 it's often predictable that when there is
16 discrimination against federal contractors, the
17 costs of that discrimination will ultimately be
18 borne by the United States.

19 And the last thing, in response to
20 Justice Breyer's question, our complaint here is
21 not that Washington has treated -- treating the
22 workers too generously. If Washington wanted to
23 spend its own funds to benefit a class of
24 Washington residents that it believed had not
25 been treated as well as they should have by the

1 federal government, its authority to spend state
2 treasury funds wouldn't be impacted by
3 principles of intergovernmental immunity.

4 The problem here is that Washington
5 has decided that the United States should be
6 doing more for this class of Washington
7 residents, but it's not within the power of a
8 single state to determine how much the federal
9 government should be doing to solve a national
10 problem.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 11:03 a.m., the case
16 was submitted.)

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